

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
<b>Charter Communications Inc.,</b>	)	
<b>Time Warner Cable Pacific West, LLC, and</b>	)	CSR-8955-Z
<b>Bresnan Communications, LLC</b>	)	
	)	
Petition for Declaratory Ruling,	)	
Enforcement Order, and Further Relief For	)	MB Docket No. 18-91
Violations of Sections 76.1603 and 76.309	)	
of the Commission's Rules	)	
	)	
<b>Charter Communications Inc., and</b>	)	
<b>Falcon Telecable,</b>	)	CSR-8956-Z
<b>Time Warner Cable Pacific West LLC, and</b>	)	
<b>Bresnan Communications, LLC</b>	)	
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Petition for Declaratory Ruling,	)	
Enforcement Order, and Further Relief For	)	MB Docket No. 18-101
Violations of Sections 76.1603 and	)	
76.1619 of the Commission's Rules	)	

**REPLY TO OPPOSITION**

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## **SUMMARY**

Charter's response offers no exculpatory evidence, and merely attempts to shift blame and obfuscate the core issue. Based on the full record now before the Commission, it is clear that Charter had more than sufficient control over its ability to carry Northwest programming to have been able to either avoid the blackout, or to defer it long enough to comply with its regulatory obligations. Charter instead chose to deprive consumers of programming they continue to pay for, without notice, and in direct violation of the Commission's rules.

Charter also fails to offer any persuasive defense of their Broadcast TV Surcharge. Charter asserts that it is legal on the basis that it is a cost pass through, yet simultaneously insists it cannot be reduced as it does not actually reflect the costs Charter incurs for broadcast programming. The only things that are clear about Charter's Broadcast TV Surcharge are, first, that its separate itemization on Charter's bills is a violation of the Commission's billing rules. Second, having represented that it is a "pass-through" rather than something else, it is obligated to live with the consequences of that representation, and refund the amounts it saved by dropping the broadcast channels. It can always increase rates should it desire to do so, but it must do that in accordance with FCC rules.

For the reasons outlined below, and based on the complete record now before the Commission, the underlying Petitions should be granted in full, sufficient penalties and forfeitures assessed against Charter as are necessary to ensure these violations of the Commission's rules do not become standard practice, and refunds ordered paid to subscribers.

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**REPLY TO OPPOSITION**

The Cities of Yuma, Arizona; El Centro, California; Crescent City, California; and the Town of Jackson, Wyoming (“Cities”) submit this Reply to the Opposition filed by Charter Communications Inc. (“Charter”) in the above-captioned proceedings.<sup>1</sup> Charter’s Opposition misstates the underlying facts of the dispute, and fails to justify its misconduct. The Commission should grant the underlying Petitions in full.

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<sup>1</sup> Opposition to Petitions for Declaratory Ruling, Enforcement Order, and Further Relief, *In re Charter Communications Inc.* CSR-8955-Z, CSR 8956-Z, MB Docket Nos. 18-91, 18-101 (Apr. 26, 2018) (“Charter Opposition”).

**I. CHARTER CHOSE A DELIBERATE COURSE OF ACTION THAT REFLECTS NO EFFORT TO COMPLY WITH ITS REGULATORY OBLIGATIONS.**

**A. Charter's Conduct Is Not Excused By Ongoing Negotiations.**

Charter repeatedly insists that it should not be held to account for failing to provide the notice required under FCC rules, largely on the basis that the existence of ongoing negotiations excuses that failure. To a large degree, that effort is based on a mischaracterization of the record, or a sleight of hand. For example, Charter characterizes the Brady Declaration as suggesting Charter provided *no* written offers until after the agreement had expired.<sup>2</sup> The Brady Declaration does not suggest this, however – it expressly states that Charter did not put its January 17th offer in writing until after the agreement's expiration.<sup>3</sup> Charter does confirm that it put no agreement in writing between November 20, 2017, and February 2, 2018 – a critical period of more than two months under Charter's own timeline.<sup>4</sup>

More importantly, Charter's actions in "negotiation" cannot justify its failure to provide notice. Charter should have provided notice of its expected termination of carriage to subscribers potentially as early as January 1, 2018, yet failed to do so, and by its own account did not reach out to Northwest again until January 17, 2018 – the same day it began planning to protect its interests (but not think of its customers) in the event of a blackout. Charter again waited two weeks, having made no written offer for, by now, more than two months, before

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<sup>2</sup> Charter Opposition at 5.

<sup>3</sup> Declaration of Brian Brady, Chief Executive Officer, Northwest Broadcasting, Inc. at ¶ 3 ("Brady Declaration") ("Approximately two weeks before the expiration of the Contract, Charter gave Northwest an oral contract proposal, but Charter did not put its proposal in writing until 4:00pm Eastern time on February 2, 2018, two days after the existing agreement had expired.")

<sup>4</sup> Charter Opposition at 5; Declaration of Adam Weinstein, Senior Vice President of Programming Acquisition, Charter Communications Inc., at ¶¶ 5, 7, 11 ("Weinstein Declaration") (stating that Charter sent written proposals to Northwest on October 25 and November 20, 2017, and not again until February 2, 2018.) .

seeking its first extension just eight hours before the deal expired. These are the actions of an entity prioritizing negotiating leverage over all other obligations, and expecting the Commission now to endorse the fact that its actions left customers holding the bag.

**B. Charter Rejected Extensions and Fails to Acknowledge the Conditions It Attached to Extensions It Offered.**

Charter suggests it never turned down an extension offer, but evidence in the record shows otherwise. According to emails submitted by Charter and corroborated by Jon Rand, Chief Operating Officer of Northwest Broadcasting, “Charter was offered an extension first through midnight [on February 2], then through 5pm tomorrow, Saturday February 3rd.”<sup>5</sup> Charter omits this inconvenient fact from its narrative.<sup>6</sup> Hence, when Charter says it received only a “seven hour extension on February 2” without acknowledging that it also received a subsequent extension offer into the next day,<sup>7</sup> it is avoiding the obvious: it was Charter that pulled the plug here. Specifically, “Weinstein rejected [the extension through Saturday, February 3, at 5 p.m.] and at approximately 4:55 p.m. terminated our call, making clear that Charter was taking down the Northwest stations in five minutes.”<sup>8</sup> Charter had opportunities to keep the signal flowing for more than a day beyond the eventual blackout time, but chose not to accept such extensions, or to seek further extensions.

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<sup>5</sup> Charter Opposition Attachment A at 1 (email from Northwest to Charter, Feb. 2, 2018, 5:14 p.m.); *see also* Declaration of Jon Rand, Chief Operating Officer, Northwest Broadcasting, Inc., at ¶ 9 (“Rand Declaration”) (“...during a telephone conversation with Weinstein between 4:30 and 5 p.m. on February 2, 2018, I offered [...] to extend until 5 p.m. on Saturday, February 3, 2018.”)

<sup>6</sup> *Compare* Charter Opposition Exhibit A at 1 (email dated 2/2/18 5:14pm) *with* Charter Opposition at 6.

<sup>7</sup> Charter Opposition at 15.

<sup>8</sup> Rand Declaration at ¶ 9.

Charter argues that its offer of a multi-day extension to last through the Super Bowl on February 4 is essentially exculpatory. That offer not only represented an abrupt departure from the day-to-day extensions Charter had originally proposed;<sup>9</sup> it also came with conditions which Charter fails to mention. Specifically, in making that offer, “Weinstein told [Rand] [...] that if the parties had not concluded the Retransmission Consent Negotiation by February 5 at 5 p.m., Charter would not agree to any further extensions.”<sup>10</sup> This corroborates the Brady Declaration, which noted that Charter indicated it would “pull the Northwest stations covered by the Contract” from its cable system on February 5.<sup>11</sup> To the extent Charter was willing to provide the three-day extension upon which the bulk of its defense rests, it was tied to a guarantee of a blackout under conditions where it could not possibly comply with its regulatory obligations. Charter unequivocally demonstrated control over the programming carriage here, and a deliberate choice to forego regulatory compliance in favor of a blackout.<sup>12</sup> Northwest, in contrast, has stated unequivocally that it “was willing to grant Charter further extensions to carry the channels”<sup>13</sup> and that “[a]t no time did Northwest threaten to withhold consent to further extensions within the Day-to-Day Framework, nor did Northwest ever have any intention to do so.”<sup>14</sup> As the Brady Declaration notes, Charter did not “ask for a 30-day extension at any point

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<sup>9</sup> See Rand Declaration at ¶¶ 9-10; see also Petition for Declaratory Ruling, Enforcement Order, and Further Relief, *In re Charter Communications*, CSR-8955-Z, MB Docket No. 18-91, at 5-6 (2018) (“Yuma et al Petition”).

<sup>10</sup> Rand Declaration at ¶ 8.

<sup>11</sup> Brady Declaration at ¶ 4.

<sup>12</sup> It is striking that Charter not only chose to set up a website to blame the blackout on Northwest about two weeks before the scheduled expiration; it also cancelled advertising on Northwest stations at about the same time, but did nothing to comply with its notice obligations. See, n. 30 *infra*.

<sup>13</sup> *Id.* at ¶ 5.

<sup>14</sup> Rand Declaration at ¶ 9.

in the negotiations.”<sup>15</sup> Charter does not dispute this, and the record reflects numerous other missed opportunities in which Charter could have acted to mitigate the harm and confusion its decision to drop Northwest’s channels caused. The key here is that the decision to drop the stations was Charter’s decision, not the decision of Northwest. Charter’s conduct cannot excuse the failure to provide notice.

**C. Charter’s After-the-Fact Remediation Actions Are Irrelevant.**

Charter argues that its violation of the Commission’s rules should be excused because it took subsequent actions to minimize consumer harm. The commercial viability of any particular post hoc contract offer is immaterial here. What matters in this case is that Charter had control of the circumstances leading to the blackout, but failed to give notice. The “mitigation,” such as it was, does not somehow excuse violation of rules, and the Commission should not endorse an approach that amounts to “we broke the law intentionally, but we tried to minimize the harms we caused.” As it happens, the “mitigation” efforts are hardly exculpatory. Subscribers received no refunds for the reduction in service and corresponding increase in rates. Subscribers did not have a straightforward way to put a timely substitute in place.

**II. CHARTER VIOLATED THE COMMISSION’S RULES.**

**A. Charter is Subject to the Advance Notice Requirement, and the Removal of Northwest Stations Was Clearly “Within the Control” of Charter.**

Charter alone is responsible for compliance with its regulatory obligations, including but not limited to the customer service standards at issue here. Yet Charter argues, in essence, argues that that it bears no obligation to even *attempt* to comply with those obligations unless *Northwest*

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<sup>15</sup> Brady Declaration at ¶ 5.



took steps that made it simple for Charter to comply.<sup>16</sup> In fact, because it is Charter's duty to comply, it is Charter, and not Northwest, that must take proactive steps to comply, and avoid steps that prevent compliance – and as the facts show in this case, it did neither. Under applicable Commission precedent, Charter's conduct is not excused.

1. Charter's Actions May Not Be Excused Under NFL Network.

Charter first argues that it should be relieved of responsibility in light of the Media Bureau's *NFL Networks* decision. In that case, Charter argues, Time Warner was offered, and rejected, an extension which would have allowed it to comply with its notice obligations; Charter then argues that without a proffered 30-day extension, it was free to pull stations without notice.<sup>17</sup> Charter takes the wrong message from the decision. The Bureau stated that, had the NFL *been unwilling* to provide a 30-day extension, the case might have turned out differently.<sup>18</sup> Rather than creating some obligation that Northwest offer Charter a 30-day extension, the case actually suggests that *Charter* must show it reasonably proposed such an extension and that the extension was refused in order to even potentially avoid notice obligations.<sup>19</sup> Indeed, the Commission noted in that case that Time Warner's "understanding of control is untenable, as it would mean that any time a programming contract expired, the cable operator could drop the

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<sup>16</sup> Charter also advances a policy argument, and asks the Commission to clarify that "the 30-day advance notice requirement does not apply when a cable operator and a programmer or broadcaster remain in carriage negotiations, even during the final 30 days of an agreement." See Charter Opposition at 13, footnote 40. This request is far outside the scope of this proceeding, and to the extent Charter wishes to challenge the underlying rule, such an effort would be more properly the subject of separate a Petition for Rulemaking. See *Pasadena, California, Nashville, Tennessee, and Virginia Beach, Virginia Petitions for Declaratory Ruling on Franchise Fee Pass Through Issues*, Memorandum Opinion and Order, 16 FCC Rcd. 18192, 18201-02 (2001) (directing petitions to raise unrelated matters through separate proceedings.)

<sup>17</sup> Charter Opposition at 11-12.

<sup>18</sup> *In the Matter of Time Warner Cable*, MB Docket No. 06-151, Order on Reconsideration, 21 FCC Rcd. 9016, 9021 (2009) ("NFL Network Reconsideration Order").

<sup>19</sup> *Id.*

programming at issue without any notice to subscribers. This result would substantially undermine the Commission’s intent in adopting section 76.1603.”<sup>20</sup>

In this case, the emails show Charter consciously chose to pursue “day by day” extensions, but then abandoned that approach and demanded a three-day extension – far less than required to permit compliance with Charter’s obligations.<sup>21</sup> Charter conditioned its own short-term extension offer on a promise of a blackout if negotiations did not succeed,<sup>22</sup> and furthermore *rejected* on at least one occasion, further extension offers from Northwest that would have allowed negotiations to proceed on the “day-to-day” basis Charter itself proposed.<sup>23</sup> *NFL Networks* thus suggests that Charter is responsible for its failure to provide notice.

2. The Blackout is More Properly Characterized as Within Charter’s Control than Outside It.

Charter argues that the breakdown in programming negotiations is more properly characterized as outside of an operator’s control. Its point, as we understand it, is that the success of negotiations is not up to Charter – and hence the timing of the removal of the programming is not up to Charter, either. Of course, Charter does make the decision to accept or reject a programming offer, and as this case illustrates Charter was in a position to accept or reject extensions. But more generally, the focus on the fact that one cannot predict exactly how negotiations will proceed simply ignores that the contracts all do have termination dates, and it is

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<sup>20</sup> *Id.*

<sup>21</sup> Rand Declaration at ¶ 8; Charter Opposition Attachment A at 1-4 (emails noting Charter’s rejection of day-to-day extensions and change to proposal of one three-day extension.)

<sup>22</sup> Rand Declaration at ¶ 8 (“Weinstein told me [...] that if the parties had not concluded the Retransmission Consent Negotiation by February 5 at 5 p.m., Charter would not agree to any further extensions”); *see also* Brady Declaration at ¶ 4.

<sup>23</sup> Charter Opposition Attachment A at 1 (email from Northwest to Charter dated Feb. 2, 2018, 5:14 p.m.); *see also* Rand Declaration at ¶ 9.

entirely up to the operator whether to give notice in advance, or to withhold notice and seek appropriate extensions. Here, as shown above, Charter did neither.

Charter proposes no sensible definition that excuses its conduct and that would protect the consumer interests that are intended to be protected by the notice rules. As shown in Cities' initial filings, and as Charter does not really rebut, the FCC's most extended explication of what is and within an operator's control is reflected in the customer service regulations, and in the definition and examples as to what constitute "normal operating conditions."

Charter argues that its actions should be considered outside of a cable operators control even considering the standards set out in 47 C.F.R. § 76.309(c)(4)(ii), but its argument fails to come to grips with the lines drawn by the regulation. Those items outside the control of cable operators include "natural disasters, civil disturbances, power outages, telephone network outages, and severe or unusual weather conditions."<sup>24</sup> In contrast, those items *within* an operator's control include "special promotions, pay-per-view events, rate increases, regular peak or seasonal demand periods, and maintenance or upgrade of the cable system."<sup>25</sup> Both lists are non-exhaustive, but what distinguishes between the categories is the degree of foreseeability, and the ability of an operator to take action in advance to avoid or minimize non-compliance. No event that might be considered a part of routine business operations (such as a retransmission consent negotiations, which Charter has successfully completed for "hundreds" of stations<sup>26</sup>) is listed as an example of circumstances outside a cable operator's control, and none should be.

Control need not be entirely with the operator. In adopting the "normal operating conditions" definition, the Commission described the example of "special promotions or pay-

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<sup>24</sup> 47 C.F.R. § 76.309(c)(4)(ii).

<sup>25</sup> *Id.*

<sup>26</sup> Charter Opposition at 8.

per-view events” potentially taxing cable operator resources, the Commission found it was not “unreasonable to require the cable operator to adjust its staffing to maintain compliance with the customer service standards during those periods.”<sup>27</sup> Even where the impact of an event is outside of a cable operator’s control, so long as the operator “knows the schedule reasonably well in advance,” the responsibility lies with the operator to take such actions as are necessary to ensure compliance with the customer service rules.<sup>28</sup> From Charter’s perspective, a blackout was sufficiently likely so as to compel Charter to act to protect its business interests, and to take “prudent measures to prepare for a blackout.”<sup>29</sup> Compliance with its legal obligations was not among those “prudent measures” however.<sup>30</sup> Charter’s decision not to provide notice was tactical, not excusable.

**B. Section 76.1603(c) Is Applicable to Charter.**

Charter argues that Section 76.1603(c) of the Commission’s rules is “inapplicable” to Charter because that regulation applies only to communities where rates are regulated.<sup>31</sup> Of course, even in cases where a regulation was adopted as part of the rules implementing rate regulation, the Commission has held, and the DC Circuit has affirmed, that provisions of the Act

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<sup>27</sup> In the Matter of Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992, Consumer Protection and Customer Service, MM Docket No. 92-263, Report and Order, 8 FCC Rcd. 2892, 2903 (1993) (“1993 Customer Service Order”).

<sup>28</sup> *Id.*

<sup>29</sup> See Charter Opposition at 8 (“In the last several years alone, Northwest’s requests for outrageous fees have led to blackouts with video distributors around the country including with Verizon FiOS, Cable One, DirecTV, and DISH Network.”); Charter Opposition at 13; Rand Declaration at ¶ 10 (“Charter moved on January 17, 2018 to cancel all of its advertising on Northwest stations”); Yuma et al Petition at 7-8 (describing Charter’s registration of a website attacking Northwest two weeks before the deal expired).

<sup>30</sup> Charter Opposition at 13 (conceding that Charter undertook “prudent measures to prepare for a blackout”).

<sup>31</sup> *Id.* at 15-16.

which are applicable in a rate regulation regime may remain applicable, particularly where the provision “is directed entirely at the terms of purchase and sale other than rates.”<sup>32</sup> The Commission has specifically rejected the argument that 47 C.F.R. § 76.1603(c) is tied to the existence of rate regulation, finding that “that interpretation is contrary to the express language of the rule, which is not limited to rate changes.”<sup>33</sup> It ruled:

“Regardless of whether a cable system is subject to rate regulation, Section 76.1603(c) requires a cable operator to provide ‘30 days written notice to both subscribers and local franchising authorities before implementing any rate or service change.’ As noted by the Bureau, TWC’s preferred construction of the rule would obviate notice to both LFAs and consumers in non-rate-regulated areas and, furthermore, would do so in an ever-increasing number of areas across the nation. Moreover, requiring notice to LFAs serves a broader purpose than facilitating their rate regulation responsibilities.”<sup>34</sup>

Charter cites no other legal authority to support its assertion, and makes no reference to any provision in the Commission’s Rules, the Act, or any other Commission precedent indicating that the applicability of 47 C.F.R. § 76.1603(c) is in any way dependent upon the authority to regulate rates.<sup>35</sup>

The conclusion that the notice rules remain enforceable is not altered by the fact that notice is required both to customers and to local franchising authorities. In adopting its customer service rules, the Commission interpreted the Act to require the Commission to “establish baseline customer service standards on which local governments may rely” in regulating the

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<sup>32</sup> See *Time Warner Entertainment Co. L.P. v. FCC*, 56 F.3d 151, 194 (D.C. Cir. 1995).

<sup>33</sup> *In the Matter of Oceanic Time Warner Cable et al*, Order on Review, 24 FCC Rcd. 8716, 8725-26 (2009) (“Oceanic Time Warner et al Order”).

<sup>34</sup> *Id.*

<sup>35</sup> Charter Opposition at 15-16.

cable operators in their communities.<sup>36</sup> Notice to franchising authorities of forthcoming changes “serves a broader purpose than facilitating their rate regulation responsibilities.”<sup>37</sup>

Charter’s only other objection to culpability under Section 76.1603(c) is to repeat its assertion that the removal of Northwest’s stations was not within Charter’s control.<sup>38</sup> But the Commission has previously found that “section 76.1603(c)’s applicability is not limited to circumstances where the change in programming services is within the control of the cable operator.”<sup>39</sup> Charter otherwise makes no effort to justify its failure to provide the notice required by Section 76.1603(c).

**C. Charter’s Continued Imposition of the Broadcast TV Surcharge Violates the Commission’s Rules.**

1. Charter Does Not Accurately Describe or Consistently Apply its Broadcast TV Surcharge Nationwide.

Charter argues, first, that its Broadcast TV Surcharge is “imposed on a national, per-subscriber basis.”<sup>40</sup> In reality, Charter imposes differing surcharges on different customers, in different markets, at different times. Charter’s billing to Crescent City includes a Broadcast TV Surcharge of \$7.50 for billing periods from December 20, 2017 through March 19, 2018.<sup>41</sup> In contrast, Jackson and Yuma subscriber bills within that same time period reflect a \$8.85

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<sup>36</sup> 1993 Customer Service Order, 8 FCC Rcd. at 2895.

<sup>37</sup> Oceanic Time Warner et al Order, 24 FCC Rcd. at 8726.

<sup>38</sup> Charter Opposition at 16.

<sup>39</sup> NFL Network Reconsideration Order, 21 FCC Rcd. at 9023.

<sup>40</sup> Charter Opposition at 17.

<sup>41</sup> See Declaration of Eric Wier, Interim City Manager, Crescent City, California (“Wier Declaration”) Exhibit B (Charter bills reflection \$7.50 Broadcast TV Surcharge.)

Broadcast TV Surcharge.<sup>42</sup> Charter plainly does *not* impose this surcharge on a consistent basis nationwide.

Second, Charter’s claim that the surcharge is not represented to be a “direct, one-to-one pass through of retransmission expenses Charter incurs in each local market” is, at best, so ambiguous as to be misleading.<sup>43</sup> Factually, Charter has not provided the detail as to how it actually calculates the fee to permit the Commission (or communities) to assess the claim. But, the fact that Charter may internally calculate the fee in a way which has no relation to actual costs in any community is more damning than helpful to the company. Charter’s website describes its surcharge as passing “those costs” it incurs from retransmission consent “on to consumers.”<sup>44</sup> Nowhere in this explanation does Charter indicate in any way that the surcharge is a nationwide average, is not a direct pass-through, or is not reflective of the actual amounts Charter pays.<sup>45</sup> A plain reading of Charter’s statement that “we’ll be passing those charges on as a Broadcast TV Surcharge” would lead a reasonable consumer to infer that the surcharge is a direct, one-to-one pass-through resulting from “TV stations increasing the rates to Charter Communications.”<sup>46</sup> And indeed as Charter acknowledges in its Opposition, some of its bills

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<sup>42</sup> See Petition for Declaratory Ruling, Enforcement Order, and Further Relief, *In re Charter Communications*, CSR-8956-Z, MB Docket No. 18-101 (2018) (“Crescent City Petition”) Attachment 1 (Jackson, Wyoming Charter Bills); Crescent City Petition Attachment 2 (Yuma, Arizona Charter Bills) (Charter bills reflecting \$8.85 Broadcast TV Surcharge.)

<sup>43</sup> Charter Opposition at 17-18.

<sup>44</sup> Charter Spectrum, “What is the Broadcast TV Surcharge on my statement?” (last accessed Apr. 30, 2018), <https://www.timewarnercable.com/en/support/faqs/faqs-account-and-billing/billing/what-is-the-broadcast-tv-surcharge-on-my-statement.html>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

state “that the surcharge ‘reflects costs incurred from local Broadcast TV stations.’”<sup>47</sup> Charter asks that consumers and the Commission disregard its own plain statements to consumers in favor of an explanation only provided by Charter here, when challenged.

2. Charter’s Broadcast TV Surcharge is Impermissible Under Commission Rules.

Charter is furthermore erroneous in claiming that its Broadcast TV Surcharge is permissible under Commission precedent.<sup>48</sup> Charter first argues that it is not precluded from such itemization so long as “the operator includes such costs in its single rate for cable service.”<sup>49</sup> Charter fails, however, to specify which part of its bill actually reflects the “single rate for cable service.”<sup>50</sup> The Broadcast TV Surcharge is only included in the “single rate for cable service” if Charter means that the “Current Charges Due” line on its bills reflects its single rate for service. In fact, that line is simply a summation of all the individual charges the customer pays, and includes, for example, charges for Internet and voice service, which are not cable services under the Commission’s rules. The Commission should not be fooled – Charter’s surcharge is listed outside its basic cable rate, and not included in it, and is impermissible.

3. The Broadcast TV Surcharge Is Not A Cost of Complying with Government-Imposed Obligations.

Charter furthermore argues, erroneously, that its surcharge is not misleading when presented as a fee to recover costs of complying with governmental obligations.<sup>51</sup> Charter repeats a tired argument, already rejected by the Commission, that retransmission consent fees

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<sup>47</sup> Charter Opposition at 18 (citing Crescent City Petition, Exhibit D to Declaration of Marcela Piedra, City Manager, City of El Centro, CA.)

<sup>48</sup> Charter Opposition at 18.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 18-19.

<sup>51</sup> *Id.* at 19.



are imposed by government mandate and thus permissible for a separate line item.<sup>52</sup> Charter is incorrect. Charter misconstrues a narrow excerpt from the Commission’s 1993 Rate Regulation Order, which states in full that:

Retransmission and copyright obligations are, in our view, no different from all other binding obligations of cable operators to pay those who supply them with goods and services. They are imposed by government *only in the sense that all legal obligations are imposed by government* and are *different in kind from the tax and regulatory impositions that appear to be the subject of this section*.<sup>53</sup>

The Commission further stated, explicitly, that these costs are “consensual arrangements relating the consideration to be paid in exchange for carriage of signals or programming” and not the type of government-imposed costs whose itemization is protected by 47 U.S.C. 544(c), the statute then at issue and which protects for providers the right to itemize certain charges.<sup>54</sup> Charter’s rehash of an argument rejected by the Commission more than two decades ago is unpersuasive and should be rejected.

4. Commission Action to Hold Charter Accountable for its Broadcast TV Surcharge is Not Impermissible Rate Regulation.

Setting aside whether the itemization violates the rules, the fact that the surcharge is represented to consumers as a pass-through of fees means that if the fees drop, the company is obligated to reduce the pass-through. Charter attempts to avoid refunds by claiming that ordering refunds is unlawful rate regulation.<sup>55</sup> The fact that the Cities lack the authority to

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<sup>52</sup> *Id.*

<sup>53</sup> *In the Matter of Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631, 5969 (1993) (“1993 Rate Regulation Order”) (emphasis added).

<sup>54</sup> *Id.* at footnote 1402.

<sup>55</sup> Charter Opposition at 19-20.

regulate rates, however, is immaterial. This is not a question of rate regulation, but rather a question of customer protection, which (under FCC rules) requires accuracy in billing and proper notice of rate increases. In a deregulated rate environment, it is particularly critical that companies not be permitted to falsely blame others for rate increases, or falsely claim that something is a mere pass-through when it is not: deceptive claims make it harder for customers to compare rate options, and to assess responsibility for those charges. If the charge is not a direct pass-through – which seems to be what Charter is now claiming – it is even less excusable under Commission rules, and the line charge cannot be charged at all. That is, Charter cannot claim that it is a cost-based recovery fee which is permissibly added in addition to the advertised rate for service, while simultaneously arguing that it need not be cost-based as to particular subscribers or communities, and in any event does not and need not reflect Charter’s actual costs, or be reduced in the event Charter no longer incurs the costs it is designed to cover. Charter is free to charge what it wants (that is, its rates are not regulated) but it is not free to characterize the rates however it desires, or escape the consequences of falsely characterizing them.

**D. The Commission Has the Clear Authority To Order Appropriate Relief Including But Not Limited To Subscriber Refunds**

1. Potential Inconvenience for Charter in Adjusting Rates Does Not Excuse Excessive Billing.

Charter argues that it would be “impracticable” for it to expect Charter to adjust rates for consumers when it adds or removes programming.<sup>56</sup> But that is plainly not the case. If the 30-day notice is provided, the company can easily notify subscribers that rates will remain the same, be increased, or decreased, as it deems appropriate. And in any case, Charter’s complaint is nothing more than a collateral attack on the notices rules, compliance with which does not

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<sup>56</sup> Charter Opposition at 21.

depend on Charter's convenience, but instead because Congress directed the FCC to "establish standards by which the cable operators may fulfill their customer service requirements."<sup>57</sup>

2. The Commission Has Ample Authority To Order Refunds.

Charter insists that, even if its conduct is unlawful, the Commission lacks authority to direct it to return the monies it illegally collected from subscribers. The Commission has ample authority to do so. As shown *supra*, ordering refunds would not be unlawful rate regulation, and the Commission's authority to develop remedies is otherwise broad, particularly where directed at correcting violations of specific statutes.<sup>58</sup> Congress enacted Section 632 of the Act directing the Commission to address cable customer service, and Section 4(i) gives the Commission the authority to act as necessary to carry out those objectives. Section 4(i) of the Communications Act "empowers the Commission to deal with the unforeseen—even if it that means straying a little way beyond the apparent boundaries of the Act—to the extent necessary to regulate effectively those matters already within the boundaries."<sup>59</sup> Refunds are the appropriate and obvious remedy for violations of customer service and billing rules,<sup>60</sup> and in cases where excess

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<sup>57</sup> 1993 Customer Service Order, 8 FCC Rcd at 2893.

<sup>58</sup> *See, e.g.* 47 U.S.C. § 154(i).

<sup>59</sup> *North American Telecomm. Ass'n. v. FCC*, 772 F.2d 1282 (7th Cir. 1985); *see also*

<sup>60</sup> The Commission itself has required refunds as part of Consent Degrees, *see, e.g.* Comcast Consent Decree; *see also In the Matter of Cox Communications Inc. Fairfax County, Virginia Cable System*, Notice of Apparent Liability for Forfeiture and Order, 23 FCC Rcd. 14944 (Media Bureau, 2008) (ordering refunds for violations of Commission's customer service and CableCARD rules), *vacated by* Oceanic Time Warner Cable et al Order, 24 FCC Rcd. 8716 (vacating Media Bureau orders based on reconsideration of underlying rule violations, but not rejecting permissibility of refunds as part of ordered remedy).

monies have been collected, may be “absolutely necessary.”<sup>61</sup> A resolution that effectively rewards Charter for avoiding Commission rules simply does not remedy the violation.

3. Charter Cannot Use its Terms of Service to Sidestep Federal Law.

Charter finally asserts that in any event, subscribers are not entitled to refunds because Charter’s Terms of Service do not entitle subscribers to refunds.<sup>62</sup> As an initial matter, this underscores the clear need for Commission action, as Charter asserts the tens of thousands of subscribers who have been harmed are forbidden by their contracts with Charter from seeking any *private* redress for Charter’s illegal actions. In any event, however, Charter is impermissibly attempting to use the Terms of Service to avoid its regulatory obligations, particularly with regard to the accuracy and clarity of its bills and its obligation to provide notice of service changes in advance, in order to allow subscribers to make informed choices before they suffer a loss of service. If interpreted as Charter asserts, Charter’s Terms of Service are contrary to public policy and should be declared void.<sup>63</sup>

The Cities suspect, however, that Charter does not intend to argue its Terms of Service supersede the Commission’s rules, and intends that they be construed in a manner consistent with applicable law. Charter’s Terms of Service state, in fact, that “the Cable Service, including but not limited to all programming [...] are subject to change *in accordance with applicable*

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<sup>61</sup> See *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1107-08 (D.C. Cir. 1987) (finding that any remedy other than refunds, in case where common carriers had exceeded their permissible rate of return, would directly violate the rules.)

<sup>62</sup> Charter Opposition at 21-22.

<sup>63</sup> See *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224 (1986) (“If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions.”)

law.”<sup>64</sup> In this case, therefore, Charter’s Terms of Service are more properly interpreted to prohibit refunds in instances where Charter has otherwise acted in accordance with all applicable law. Charter has here violated the Commission’s rules, rendering the prohibition on refunds in Charter’s Terms of Service meaningless as a barrier to the issuance of refunds.

## CONCLUSION

Charter’s Opposition offers no newly dispositive facts, and relies on incorrect or already-rejected arguments in support of Charter’s efforts to avoid accountability for its actions. The Commission’s customer service standards and billing rules exist to ensure consumers are protected from abuses of precisely the sort seen here, and Commission action is without question warranted. Accordingly and for the foregoing reasons, the Commission should expeditiously reject Charter’s Opposition and grant the underlying Petitions in full.

Respectfully Submitted,

/s/ Elizabeth Martyn  
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City Attorney, City of El Centro, California  
Sunny Hunyn  
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Ontario, CA 91761  
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/s/ Joseph Van Eaton  
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2000 Pennsylvania Avenue N.W., Suite 5300  
Washington, DC 20006  
*Counsel for Yuma, Arizona; Crescent City, California; and Jackson, Wyoming*

May 7, 2018

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<sup>64</sup> Spectrum Residential General Terms and Conditions of Service § 8(a), <https://www.spectrum.com/policies/residential-terms.html> (emphasis added.)

### **CERTIFICATE OF SERVICE**

I hereby certify that, on May 7, 2018 I caused the forgoing **REPLY TO OPPOSITION** to be filed electronically with the Commission via the ECFS system and caused a copy of the foregoing to be served upon the following individual by electronic mail:

Maureen O'Connell  
Vice President, Regulatory Affairs  
Charter Communications, Inc.  
601 Massachusetts Avenue N.W., Suite 400W  
Washington, D.C. 20001

Dated: May 7, 2018

By: /s/ Joseph Van Eaton  
Joseph Van Eaton  
BEST BEST & KRIEGER LLP  
2000 Pennsylvania Avenue, N.W., Suite 5300  
Washington, DC 20006  
Telephone: 202-785-0600

**Attachment A**

**Declaration of Jon Rand**

## **DECLARATION OF JON RAND**

I, Jon Rand, under penalty of perjury, hereby declare that I have reviewed the April 26, 2018 Declaration of Adam Weinstein (“Weinstein”), Senior Vice President of Programming Acquisition at Charter Communications, Inc. (“Charter”), submitted to the Federal Communications Commission (“FCC”) in connection with MB Docket Nos. 18-91 and 18-101 (the “Weinstein Declaration”). I understand that my Declaration will also be submitted to the FCC.

The facts set forth below in response to the Weinstein Declaration are true and correct to the best of my knowledge and belief.

1. I am the Chief Operating Officer of Northwest Broadcasting, Inc. (“Northwest”) and have served as Northwest’s principal negotiator throughout the retransmission consent negotiations with Charter which are the subject of the Weinstein Declaration (the “Retransmission Consent Negotiation”).

2. The October 11, 2017 Northwest proposal referenced in paragraph 4 of the Weinstein Declaration was in line with every other initial proposal Northwest made to other multichannel video programming distributors (“MVPDS”) in the most recent must carry/retransmission consent cycle. In my January 17, 2018 telephone discussion with Weinstein, also referenced in paragraph 4 of the Weinstein Declaration, I never made the acknowledgement about proposed Northwest fees to which Weinstein attests. Rather, I conveyed Northwest’s willingness to offer to Charter a rate ceiling predicated on Northwest’s current market experience.



3. During the months leading up to the January 31, 2018 expiration date of the then existing retransmission agreement, Charter made only two written proposals to Northwest, one on October 25 and the other on November 20, both in 2017.

4. The text of the December 30, 2017 email exchange to which paragraph 7 of the Weinstein Declaration refers belies that Declaration's attestation that I informed Weinstein on that date that I "was going away on vacation for two weeks." In fact, that exchange makes clear that I was then leaving for nine days "for some mission work in Central America" and that Northwest's longtime corporate counsel, who had been involved in prior Northwest retransmission negotiations with Charter and other MVPDs, was available to handle negotiations in my absence. A redacted copy of this email exchange comprises the Attachment hereto. The nine-day mission work in question entailed ministering and on-site planning of the construction of an addition to a church in Nicaragua.

5. The verbal Charter "counterproposal" of January 17, 2018 to which the Weinstein Declaration attests in paragraph 8 contained a hypothetical question as to how Northwest might react to a proposal if it were made. I have learned through many years of participation in these types of negotiations that conversation predicated on hypotheticals allows a party later to deny it has taken a position. This is a tactic, no substitute for a bona fide, written proposal.

6. The Weinstein Declaration's characterization in paragraphs 9-13 of the facts relating to Charter's removal of Northwest signals from its cable systems at 5 p.m. EST on Friday, February 2, 2018 is misleading and incomplete in fundamental respects. All times of day referenced below are EST.

7. First, in an email sent by Charter to Northwest at 9:02 a.m. on January 31, 2018, a copy of which was submitted in the record of the FCC proceeding referenced above by both the municipality petitioners and Charter, Charter stated that “[i]n order to avoid any unnecessary disruption for our customers and your viewers, Charter is willing to agree to a day-to-day extension on status quo terms to give us ample time to continue to discuss renewal terms that work for both parties.” This email established a customary framework for moving forward, through “day-to-day” extensions that would give the parties “ample time” to resolve major issues and complete a negotiation which had already gone on for months and was likely to continue for some time (the “Day-to-Day Framework”). In negotiating with MVPDs in the past, Northwest has numerous times agreed to and followed a framework calling for multiple renewals of extensions (for example, daily, weekly) to allow the parties to continue to negotiate, and those consecutive extension periods may, viewed in totality, run for months.

8. Under the Day-to-Day Framework, Northwest and Charter agreed to two one-day extensions, which extended the existing agreement first to 5 p.m. on Thursday, February 1, 2018, and then to 5 p.m. on Friday, February 2, 2018. In an email sent to Northwest at 4:20 p.m. on Friday, February 2, 2018 (again, a copy thereof is already in the record), Charter cited a telephone conversation earlier that afternoon in which Charter abruptly abandoned the Day-to-Day Framework and demanded a three-day extension until 5 p.m. on Monday, February 5, 2018, the day after the Super Bowl. Weinstein told me in that same phone conversation that afternoon that if the parties had not concluded the Retransmission Consent Negotiation by February 5 at 5 p.m., Charter would not agree to any further extensions.

9. Northwest initially responded to Charter’s new demand with an offer to extend until midnight on February 2, 2018, but then, during a telephone conversation with Weinstein

between 4:30 and 5 p.m. on February 2, 2018, I offered, consistent with the Day-to-Day Framework, to extend until 5 p.m. on Saturday, February 3, 2018. Weinstein rejected that offer and at approximately 4:55 pm. terminated our call, making clear that Charter was taking down the Northwest stations in five minutes. In an email sent to Charter at 5:14 p.m. on February 2, 2018, I made certain that the record included Northwest's position on this critically important issue, as well as Charter's rejection thereof. At no time did Northwest threaten to withhold consent to further extensions within the Day-to-Day Framework, nor did Northwest ever have any intention to do so. It was Northwest's intention to continue to negotiate in good faith toward an agreement while Charter continued to carry Northwest's signals to the benefit of its viewers.

10. Having unilaterally abandoned the Day-to-Day Framework, Charter removed Northwest's signals from all of its systems at precisely 5 p.m. on February 2, 2018 (the "Charter Signal Removal"). The Charter Signal Removal shocked me at the time, given Northwest's commitment to what it thought was an ongoing negotiation process. With the benefit of hindsight, however, I have concluded that Charter had no intention of working reasonably to find common ground to allow either extension of the existing contract or the execution of a new agreement, but rather orchestrated the Charter Signal Removal in advance, evidenced by facts that include the following:

A. Prior to the original January 31, 2018 expiration date, Charter made only two Retransmission Consent Negotiation proposals to Northwest, none after November 20, 2017, and never made a material move in Northwest's direction.

B. Charter secured rights to the domain name "Northwestfairdeal.com" on January 18, 2018, several weeks ahead of the Charter Signal Removal.

C. Charter moved on January 17, 2018 to cancel all of its advertising on Northwest stations, signaling that Charter was looking to punish Northwest even well before the Charter Signal Removal.

D. It would have been impossible for Charter to execute the Charter Signal Removal so precisely without calculated coordination with multiple Charter cable systems across multiple television markets, closely tied to a planned-in-advance Charter Signal Removal.

E. Without considerable advance planning by Charter, I would not have received, beginning at 5:18 p.m. on February 2, 2018, less than twenty minutes after Charter executed the Charter Signal Removal, and continuing to this day, robo-emails critical of Northwest's actions vis-à-vis Charter.



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Jon Rand

Executed: May 7, 2018

# **ATTACHMENT**



[REDACTED]@northwestbroadcasting.com>  
To: [REDACTED]@charter.com>  
Cc: [REDACTED]@brownrudnick.com>  
Bcc: [REDACTED]@northwestbroadcasting.com>

Sat, Dec 30, 2017 at 4:37 PM

[REDACTED]  
I am trusting we will want to have further communication in the next month. We have been successful at reaching [REDACTED] agreements now in the last twelve months-with some of the biggest of the bigs coming together as we have approached the end of the year.

On Tuesday, January 2nd, I leave for 9 days for some mission work in Central America.

If you need contact with someone for Northwest dealing with retrans issues in my absence, please feel free to contact our attorney [REDACTED] at 202 [REDACTED]. He is with the Washington DC office of Brown Rudnick.

Happy New Year, and I will speak with you after the first of the year.

--  
[REDACTED]  
Northwest Broadcasting, Inc.  
[REDACTED]

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[REDACTED]@charter.com>  
To: [REDACTED]@northwestbroadcasting.com>  
Cc: [REDACTED]@brownrudnick.com>

Sat, Dec 30, 2017 at 5:30 PM

[REDACTED],  
Thanks for reaching out.

We too have concluded nearly [REDACTED] retransmission consent agreements with stations across the country at year end.

I continue to be available to discuss our deal when you are in a position to propose a path that works for both parties.

Happy new year and hope you have a great trip.

Regards,  
[REDACTED]

[REDACTED]  
The contents of this e-mail message and any attachments are intended solely for the addressee(s) and may contain confidential and/or legally privileged information. If you are not the intended recipient of this message